United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4152

No. 76-4152

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

EDISON, ET. AL. d/b/a SEAVIEW MANOR HOME FOR ADULTS
AND MEDICAL AND HEALTH EMPLOYEES UNION-LOCAL 4

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

B
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ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that Seaview Manor threatened its employees and instructed them not to support Local 1115, Joint Board, Nursing Home and Hospital Employees Division, in violation of Section 8(a)(1) of the Act.

2. Whether substantial evidence on the record as a whole supports the Board's finding that Seaview Manor violated Section 8(a)(2) of the Act by soliciting support for Local 4, Medical and Health Employees Union, and by recogninzing and contracting with Local 4 when it did not represent an uncoerced majority of the Manor's employees.

3. Whether substantial evidence in the record as a whole supports the Board's finding that Seaview Manor violated Section 8(a)(3) of the Act by entering a union-security agreement and checking off dues to Local 4 when it did not represent an uncoerced majority of the Manor's employees.

STATEMENT OF THE CASE

This case is before the Court upon application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 88 Stat. 29 U.S.C. Section 151 et. seq.) for enforcement of its decision and order against Harry Edison, Divadar Marcovici, and Bertram Fried, a co-partnership doing business as Seaview Manor for Adults (hereinafter "the Manor"). The Board's Decision and Order, dated January 27, 1976, is reported at 222 NLRB No. 94. (D & O 1).[1/] This Court has jurisdiction, the unfair labor practices having occurred in Queens, New York.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Manor solicited employees to sign authorization cards for Local 4, Medical and Health Employees Union (hereinafter "Local 4"), ordered its employees not to support Local 1115, Joint Board, Nusing Home and Hospital Employees Division,

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1/ The Board, with leave of Court, has deferred the preparation of the appendix, and printing of the brief in this case in accordance with Fed. R. App. Pro. 30(c). Accordingly, references in this typewritten brief are to original record. "D & O" references are to the Board's Decision and Order, "ALJD" references are to the Administrative Law Judge's Decision, "Tr." references are to the stenographic transcript of the hearing before the Administrative Law Judge, and "GC Exh." and "R. Exh." are to the General Counsel's and Respondent's exhibits, respectively. References preceding a semi-colon are to the Board's findings of fact; those following are to the supporting evidence.

and recognized and entered a union security contract with Local 4 at a time when it did not represent an uncoerced majority of the Manor's employees. The Board's detailed findings of fact, with the supporting evidence, are as follows:

A. Background

Seaview Manor is a home for the aged owned by a partnership of Harry Edison, Divadar Marcovici, and Bertram Fried (ALJD 2; Tr. 17-18). Fried is the administrator (Tr. 917). The Manor opened for business in April 1974.[2/] (ALJD 2; Tr. 305). As of July 23, it had eight full-time employees (ALJD 5; Tr. 306, GC Exh. 14).[3/]

B. The Manor Recognizes Local 4

In late June or early July, Local 1115 business agent William Morales suggested to Fried and Marcovici that his union could provide Seaview Manor with any employees it needed. Marcovici responded that Local 1115 were "troublemakers" and "no good", and that he had had a bad experience with them at hotel with which he was involved (ALJD 11; Tr. 45-47). Marcovici concluded that he would "bring in /his/ own union (ALJD 11; Tr. 46).

Also in early July, Local 4 President Robert Gordon and business Agent Vincent Gulino entered the Manor's kitchen, where they found employees Rivera, Levano, and Taylor (ALJD 6-7; Tr. 147-48, 758-59, 805-06, 991). After Gordon spoke briefly about Local 4,

2/ All dates are 1974.

3/ The employees were Gloria Rivera, Walter Henry, Belen Levano, Mike Dorencu, Benjamin Taylor, Ruth Gordon, Abigail Quijano, and Evilio Brito (Tr. 306-07).

the three employees signed authorization cards (ALJD 6; Tr. 141-42). About the same time, employee Brito signed a Local 4 card without being aware of its meaning. (ALJD 7). At the hearing, Brito, who neither speaks nor reads English, denied having signed any card for Local 4 (ALJD 7; Tr. 525-26, 533).[4/]

During the first week of July, while employee Abigail Quijano was working in the lobby of the Manor, Fried approached her, gave her a Local 4 card, told her to sign it, and left. (ALJD 7; Tr. 426-27). Gloria Rivera then took Quijano over to Robert Gordon, and introduced them. Quijano signed the card and gave it to Gordon (ALJD 7; Tr. 426-27.) After she had signed, partner Marcovici told her not to sign any other cards (ALJD 7; Tr. 427).

On July 16, attorney Burton Horowitz conducted a card check at the Manor's offices (ALJD 4; Tr. 869-70). Horowitz was given the union authorization cards employees' W-4 forms, and the Manor's payroll records. After comparing signatures on the W-4 forms and the records, Horowitz found that the Manor's eight employees had signed Local 4 cards (ALJD 5; Tr. 881). He then told Gordon, Gulino, and the three partners that his card check showed Local 4 to be the employees' representative (ALJD 5; Tr. 881). Horowitz did not interview any of the employees whose signatures appeared on the cards (ALJD 6).

4/ Local 4's cards are in English only (GC Exh. 13). Neither Gordon nor Gulino spoke Spanish (Tr. 143). No evidence was presented of any Spanish speaking person soliciting a card from Brito.

C. The Manor Opposes Local 1115's Orginizing Efforts.

On July 23 and 24, employee Gloria Rivera obtained signed authorization cards for Local 1115 from employees Brito, Levano, Quijano, and Taylor. Together with her own card, she gave these to Morales on July 24. (ALJD 11; Tr. 51-53, 434-36, 525-26, 943-45). Local 1115 filed a representation petition on July 26, and the hearing was scheduled for August 16 (ALJD 11, 13; GC Exh. 10, 11).

One or two weeks after the employees had signed Local 1115 cards, partners Fried and Marcovici approached Brito at his work station. Marcovici angrily told Brito that there was no union at Seaview Manor, adding that Brito should remember he had no "green card" — that is, he was a deportable illegal alien (ALJD 11-12; Tr. 528-530, 631, 653-54, 656-57).

About August 11, Fried told Quijano, Rivera, and Levano that Local 1115 had claimed to represent the employees. (ALJD 11; Tr. 441). He continued that the employees had caused him trouble by signing cards for Local 1115, and that he did not want that union because "he had planned on Number 4" (ALJD 11; Tr. 439-40). When Rivera said that the employees thought that Local 1115 sounded better, Fried replied that "all unions are the same" because only he would decide what benefits were received. (ALJD 11; Tr. 440-41).

D. The Manor and Local 4 Enter a Backdated Union Security Contract.

When Morales solicited Local 1115 cards from employee Rivera on July 23, Rivera told him that there was no contract at the Manor. At no time before August 14 were the employees told by anyone that there was a union contract (ALJD 10; Tr. 441-42). At the August 16 representation hearing, Gulino introduced a contract between the Manor and Local 4 dated July 17 (ALJD 10; GC Exh. 4, 11). The contract provided for a union shop, check-off, and an immediate five percent wage increase(ALJD 10; GC Exh. 4). The Manor's payroll records show that lump-sum retroactive wage increase was paid on August 14, and that contract wages were only paid after that date (ALJD 10; GC Exh. 4, 14). The Manor checked off union dues for all employees after August 14 (ALJD 12; Tr. 331-32, GC Exh. 14). The Administrative Law Judge concluded that the contract had not been entered until after Local 1115 had filed its representation petition on July 26 (ALJD 10-11).

II. THE BOARD'S DECISION AND ORDER.

From these facts, the Board found that the Manor had violated Section 8(a)(1) of the Act by threatening Brito, by telling Quijano not to sign cards for any union other than Local 4, and by telling employees that the Manor would decide which union represented them and what benefits they would recieve (D & O 3-4, ALJD 12). The Board further found that the Manor had violated Section 8(a)(2) of the Act by telling Quijano to sign a card for Local 4 (ALJD 14). Finally, the Board found that the Manor had violated Sections 8(a)(2) and (3) of the Act by entering a union security contract with Local 4 when Local did not represent an uncoerced majority of the employees (ALJD 13-15).

The Board's order requires Fried, Marcovici, and Edison to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing the Manor's employees in the exercise of their Section 7 rights. Affirmatively, the Board's order requires Fried, Marcovici, and Edison to withdraw recognition from Local 4 unless and until it is certified by the Board, to reimburse the employees for any dues checked off to Local 4, and to post the appropriate notices (ALJD 18-19).[5/]

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE MANOR INTERFERED WITH, RESTRAINED, AND COERCED ITS EMPLOYEES IN VIOLATION OF SECTION 8(a)(1) OF THE ACT.

As shown in the statement, Quijano's credited testimony is that partners Fried and Marcovici repeatedly told the employees that the choice of a bargaining representative was for the employer to make. Thus, Fried told Quijano to sign a card for Local 4, and Marcovici immediately ordered her to sign no other. When employees Rivera, Quijano, and Levano asked Fried what the union situation was, Fried told them

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5/ The Board also found that Local 4 had violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by agreeing to and executing a union security agreement with the Manor when it did not represent an uncoerced majority. The Board's order required Local 4 to cease and desist from attempting to represent the Manor's employees unless and until certifed by the Board. It further required Local 4, jointly and severally with the Manor to reimburse the employees for dues checked off (ALJD 18-19).

Local 4 did not except to the Administrative Law Judge's decision, and the Board intends to petition this Court for summary enforement of the order against it, pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e).

that he wanted no union but that he would take Local 4 if necessary. After five employees had signed cards for Local 1115, Fried told Rivera, Quijano, and Levano that they had caused him trouble by disrupting his plan to take in Local 4. He added that the identfy of the union did not matter, because only the employer could control the giving of benefits. It is well settled that an employer violates section 8(a)(1) when, as here, it attempts to dictate its choice of union to the employees. N.L.R.B. v. Better Val-U Stores of Mansfield, Inc., 401 F. 2d 491 , 493 (C.A. 2, 1968); Majestic Molded Products Co. v. N.L.R.B., 330 F. 2d 603, 605 (C.A. 2, 1964); N.L.R.B. v. Ban-R Reproductions, Inc., 309 F. 2d 898, 903, (C.A. 2, 1962); General Iron Corp., 218 NLRB No. 109, 89 LRRM 1788, enforced ____ F. 2d _____ (C.A. 2, No. 75-4242, May 21, 1976). Fried's implication that both the choice of the union and the resulting wages and working conditions were entirely in his control plainly "convey/s/ to the employees the futility of self organization," also in violation of Section 8(a)(1). N.L.R.B. v. Patent Trader, Inc., 415 F. 2d 190, 198-99 (C.A. 2, 1969); N.L.R.B. v. Ban-R Reproductions, Inc., supra.

At Rivera's request, employee Evelio Brito had signed an authorization card for Local 1115 on July 23. One or two weeks later, after Local 1115 had filed its petition, Marcovici approached Brito at his work station, told him that there was no union at Seaview Manor, and reminded him that he had no "green card." In context, this reference to Brito's status as an illegal alien subject to deportation was a thinly veiled threat of retaliation if Local 1115's efforts succeded.

Cf. N.L.R.B. v. J.P. Stevens & Co., 380 F. 2d 292, 302-03 (C.A. 2, 1967), cert. denied, 385 U.S. 1005.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE MANOR VIOLATED SECTIONS 8(a)(1), (2), AND (3) OF THE ACT BY RECOGNIZING AND SIGNING A UNION SECURITY AGREEMENT WITH LOCAL 4. WHEN THAT UNION DID NOT REPRESENT AN UNCOERCED MAJORITY OF EMPLOYEES.

Sections 7 and 9 of the Act grant employees the fundamental right of free choice and majority rule in their selection of a collective bargaining representative. Section 8(a)(2) [6/] of the Act protects this guarantee through "a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion or influence". Int'l Association of Machinists v. N.L.R.B., 311 U.S. 72, 80 (1940). Accordingly, an employer provides unlawful support in violation of Section 8(a)(2) by recognizing a minority union. Int'l Ladies Garment Workers Union v. N.L.R.B. (Bernhard - Altman Corp.), 362 U.S. 731, 738-39 (1961). The employer's good faith belief in the Union's majority is no defense, for even mistaken recognition of a minority union infringes free choice. Int'l Ladies Garment Workers Union v. N.L.R.B., supra, 362 U.S. at 7399. A fortiroi, an employer who assists a union to gain majority status by soliciting membership,

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6/ (a) It shall be an unfair Labor practice for an employer — . . .

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . .

directing employees to sign cards, or otherwise indicating its preference for the union violates Section 8(a)(2) by recognizing a majority it unlawfully helped to create. N.L.R.B. v. Link-Belt Co., 311 U.S. 584, 597-600 (1940); Int'l Association of Machinists, supra, 311 U.S. at 80-81; N.L.R.B. v. Clement Brothers, Inc., 405 F. 2d 1027, (C.A. 5, 1969).

The Board may rely on circumstantial evidence to find that a union's majority is tainted by the employer's coercion. As the Supreme Court stated in N.L.R.B. v. Link-Belt Co., 311 U.S. 584,(1940):

> It would be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice. Normally, the conclusion that their choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer violated . . . and as a result of which it may be reasonably inferred that the employees did not have that complete and unfeltered freedom of choice which the Act contemplates.

In evaluating evidence of coercion, the Board must gives due regard to the Court's observation that "even slight suggestions as to /the employer's/ choice may have telling effect among /employees/." International Association of Machinists v. N.L.R.B., 311 U.S. 72, 78 (1940). Accordingly, the Board need not establish that any specific number of employees was coerced by the employer. Instead, it may infer from a "pattern of assistance" extending before and after recognition that the employees' choice of the favored union was not free and uncoerced. Amalgamated Local Union 355 v. N.L.R.B., 481 F. 2d 996, 1002 n. 8 (C.A. 2, 1974); N.L.R.B. v. Jan Power Inc., 421 F. 2d 1058, 1063 (C.A. 9, 1970); N.L.R.B. v. Clement Brothers Co., 405 F. 2d 1027, 1029

(C.A. 5, 1969).

The credited evidence in this case shows a clear pattern of coercion and assistance on behalf of Local 4. Fried and Marcovici were hostile to Local 1115. Indeed, when business agent Morales approached them in late June or early July, Marcovici told him that Local 1115 were "troublemakers" and "no good," and that he would "bring in my own union" (Tr. 46). Cf. N.L.R.B. v. Link-Belt Co., 311 U.S. 584, 588-89 (1940). Consistent with this intention, Marcovici gave employee Rivera Local 4 authorization cards to distribute. In addition Fried ordered employee Quijano to sign a Local 4 card while employee Rivera looked on, and Marcovici immediately told Rivera not to sign any other cards. Direct solicitation by two of the three owners of the Manor tended to have a substantial coercive effect, particularly when the unit included only eight employees. Cf. Amalgamated Local Union No. 355 v. N.L.R.B., 481 F. 2d 996, 1001-02 (C.A. 2, 1973); N.L.R.B. v. Clement Brothers, 407 F. 2d 1027, 1028-29 (C.A. 5, 1969).

Furthermore, the Manor continued its pattern of assistance and coercion on behalf of Local 4 after the card check. As shown above, Marcovici threatened one employee with possible deportation after he had signed a card for Local 1115. Fried told others that he would choose Local 4. The Board could reasonably infer from the partners' continuing expressions of perference for Local 4 that they had not merely stood by while it obtained cards from the employees Amalgamated Local

Union 355 v. N.L.R.B., 481 F. 2d 996, 1002 n. 8 (C.A. 2, 1973); N.L.R.B. v. Clement Brothers Co., 405 F. 2d 1027, 1029 (C.A. 5, 1969).

The circumstances surrounding the contract between the Manor and Local 4 are almost identical to those in Amalgamated Local Union 355 v. N.L.R.B., 481 F. 2d 996, 1003-04 (C.A. 2, 1973). There, as here, the contract was used to bar a representation petition by a union the employer did not want. There, as here, the union's witnesses gave conflicting accounts of the negotiations: Gulino and Rivera did not even agree on when Rivera was present, and how she was chosen to be present or whether she said anything at all.[7/] There, as here, the inside union did not publicize the contract: Quijano testified that as of August 14 no one had told her there was a contract. There, as here, the employer rebuked employees for supporting the outside union without saying there was a contract with the inside union: Fried never mentioned a contract in his

7/ Gulino and Fried testified before the Administrative Law Judge that the contract had been negotiated in the Manor's offices on July 16 and 17 and signed on the afternoon of the 17th (ALJD 8-10; Tr. 157, 59, 173-75, 178, 386-89). Gulino, Local 4's principal negotiator, he knew nothing of the Manor's existing wages and working conditions (ALJD 9; Tr. 185-89). Gulino also testified that Gloria Rivera had been elected shop steward at a meeting he conducted on July 16, that he had brought her into the negotiations on both days, and that she approved the contract (ALJD 8; Tr. 157, 165, 173). Rivera, on the other hand, testified that she had never seen Gulino before the 17th, was not present on the 16th, and was present for only 2 or 3 hours on the 17th (ALJD 8; Tr. 991-93, 1006-07). She said did not participate in the negotiations and remebered nothing of the contract terms (ALJD 11; Tr. 993-96, 1026-27).

In addition, Gulino's testimony at the August 16 respresentation hearing differs significantly from his testimony at the unfair labor practice hearing. There he testified that several employees who he could not identify were present and that the contract was typed at the Manor (G.C. Exh. 11 pp. 7-10). At the unfair labor practice hearing he said that Rivera, whom he identified, was present, and that the contract was typed at Local 4's office (Tr. 175-78).

remarks of August 11. In addition, the Manor's payroll records show that the wage provisions of the contract did not take effect until August 14, two days before the representation hearing for contract wages from July 17 were retroactively paid in a lump sum on that day. As in Amalgamated Local Union 355, the Board could reasonably infer from these circumstances that the contract was backdated — in this case to July 17 so that Local 4 could use it to bar Local 1115's petition filed on July 23. Amalgamated Local Union Local 355 v. N.L.R.B. , supra, 481 F. 2d at 1004-05. This substantial post hoc assistance[8/] strenghtens the Board's inference that the Manor had assisted Local 4 in obtaining authorization cards before July 16. N.L.R.B. v. Clement Brothers Co., 405 F. 2d 1027, 1029 (C.A. 5, 1969).

In conclusion, the evidence in this case indicates that the partners in Seaview Manor were determined not to have their employees represented by Local 1115, but would accept Local 4. They directly ordered at least one at the eight employees, in the presence of another, to sign an authorization card. They were willing to use a backdated contract to keep Local 1115 from obtaining a free election. They displayed throughout the matter the attitude that the choice of a union was as much their decision as the choice of office supplies. The Board could reasonably have inferred from these facts that the authorization cards

8/ In Amalgamated Local Union 355 v. N.L.R.B., 481 F. 2d 996, 1004-05 (C.A. 2, 1973), this Court held that the execution of such a backdated agreement at a time when a question concerning representation existed violated Sections 8(a)(2) and (b)(1)(A) of the Act.

inspected on July 16 were the product of the employer's coercion or influence rather than the employees' free choice. Accordingly, the Manor violated Section 8(a)(2) in recognizing Local 4 after the card check. Int'l Ladies Garment Workers Union v. N.L.R.B., 362 U.S. 731 738-39 (1961); N.L.R.B. v. Link-Belt Co., 311 U.S. 584, 597-600 (1940); Clement Brothers Co. v. N.L.R.B., 405 F. 2d 1027 (C.A. 5, 1969).

It follows that the union security agreement violated Section 8(a)(3) of the Act, and that the Board appropriately ordered the Manor to reimburse employees for any checked off pursuant to the agreement. N.L.R.B. v. Hunter Outdoor Products, Inc., 440 F. 2d 876 (C.A. 1, 1971); Intalco Aluminum Co. v. N.L.R.B., 417 F. 2d 36 (C.A. 9, 1969); N.L.R.B. v. Getlan Iron Works, 377 F. 2d 894, 896-97 (C.A. 2, 1967); N.L.R.B. v. Revere Metal Art Co., 280 F. 2d 96, 100-01 (C.A. 2, 1960).

CONCLUSION

In conclusion, it is respectfully submitted that the Board's Order be enforced in full.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that pursuant to Rule 30(c) of the Federal Rules of Appellate Procedure, one typewritten copy of petitioner's brief and one copy of petitioner's designation of record have been served by mail on the below named persons:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.
this 23rd day of August, 1976.

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Dated at Washington, D.C.
this 23rd day of August, 1976.